

BEFORE LINDA MCCULLOCH  
SUPERINTENDENT OF PUBLIC INSTRUCTION  
STATE OF MONTANA  
OSPI Case No. 2007-02

IN THE MATTER OF \*\*\*

**ORDER**

**Background**

The Parties are \*\*\* and \*\*\*. [hereinafter referred to by their initials or as “the Parents”] and \*\*\*\* School District No.\*, \*\*\*\*County [address] [hereinafter “\*\*\*\*\*” or “the District.”]

Process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA) 20 USC 1400, et seq. and 34 Code of Federal Regulations (CFR) 503. The request for a hearing was filed with the Montana Office of Public Instruction (OPI).

A hearing was held in \*\*\* Montana on August 16, 2007. Jeff Hindoen, an attorney with the Montana School Board Association represented the District. The Parents represented themselves.

The Parents maintain that the School District failed to provide their daughter, [the student], with a free, appropriate, public education [hereinafter “FAPE”] because it was unable or unwilling to implement their daughter’s individualized educational program [hereinafter “IEP”] dated February 23, 2007, (2/23/2007) which was agreed to by [the student.’s] IEP team, which included the Parents and [district] personnel.

The District maintains that it was able to implement the 2/23/07 IEP to provide [the student] with FAPE and that it did so until April 12, 2007. The District maintains it remains willing and able to provide FAPE to [the student] if her parents enroll her in school for the 2007-2008 school year.

[The student] and her Parents moved to \*\*\*\*, Montana from [an out of state district] in the Fall of 2006. They lived in a motel while their new home was finished. During part of the Fall of 2006 [the student] attended \*\*\*\*\* Elementary School, which is a school in \*\*\*\* District No.\*\*. When the family moved into their new home, it became clear that they reside within the boundaries of the [district] , not \*\*\*\* District No.\*\*. On January 19, 2007, [the student] transferred from \*\*\*\* Elementary to [the

district].

[The student] is an outgoing, active, affectionate nine year old child. Exhibits of school records also note she has temper tantrums. She has serious speech and language, motor skill and cognitive problems. She was identified as eligible for special education on the basis of “other health impairment.” She was diagnosed with chronic neuro-developmental disorder by the Utah Primary Children’s Medical Center on April 1, 2003.

Her initial IDEIA evaluation was completed in 2004 by the [out of state district] when she was six years old. The evaluation noted that “due to the severity of [the student's] developmental delay, formal testing was not appropriate.” The “cognitive/academic” section of the evaluation stated she could match colors and shapes but could not identify letters or numbers. Her academic and social skills were estimated at a 3 to 3 and 1/2 year-old level. Her fine motor skills and visual perceptual skills were also at about a three year old level. She had difficulty using a pencil. Her gross motor skills were also below average. She had problems with her gait. Her speech and language skills were far below average. She was difficult to understand. Her comprehension was better than her speech but both were far below average. She had some problems with facial muscles.

[The student] was not re-evaluated when she moved to Montana. It is clear from the record, however, that [the student] continues to have serious cognitive, academic, speech and language and motor skills’ impairments. Her quarterly report for the Fall of 2006 from \*\*\*\*\* School District No. \*\* advised that she was continuing to work on colors and numbers and on speech and language skills. She is not toilet-trained, which appeared to be the source of some school trouble and tantrums. All the districts she has attended and her Parents agree on and are working toward the goal of toilet training.

The relationship between the Parents and [district] personnel deteriorated rapidly after [the student] was enrolled at [the district] on January 19, 2007. The communication journal between home and school reported many tantrums, not all of them by [the student]. On April 12, 2007, the Mother was called to the school to take [the student] home. This was the fourth time the Mother was called to the school to take [the student] home. The Parties have distinctly different versions of the

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events leading up to that day but all agree [the student] has not attended school since April 12, 2007.

The Parents maintain that most of [the student's] school day was spent in the [district] resource room, being taught primarily by teacher's aides while the special education teacher worked with students pulled out of their regular education classes for IEP education services. They maintain [the student] did not receive the special education or the related services identified in the 2.23.2007 IEP. The Parents maintain that [the student] was frustrated and unhappy. The Parents maintain that tantrums had not been a major problem at her prior schools.

The District maintains that [the student] is being provided FAPE in the District's "TLC room" (a room in the school where a certified teacher with a special education endorsement provides special education services to the approximately 21 [district] students with IEPs) and in regular education activities with the 2nd grade.

The Parents maintain that instead of addressing the education related problems and developing a behavior intervention plan to deal with the tantrums, the District would call the mother and have her come pick up [the student]. The District maintains that because [the student's] tantrums occasionally made her "unavailable for education" (the District's Superintendent's term) he telephoned the Mother four times to pick up [the student] at school. (Superintendent \*\*\*\*\*, Tr. page 78.)

[The student] has not attended school since April 12, 2007.

#### SUMMARY OF EVIDENCE PRESENTED

The following witness testified;

[Mother], Parent,  
[Father], Parent,  
\*\*\*\*, District Superintendent [of the district]  
\*\*\*\*, Director

The Following exhibits were offered, admitted and testimony was offered regarding:

Joint exhibit A/10	handwritten minutes of a meeting held 1/17/07 at ****school with the Parents. **** District personnel and **** District No. ** personnel. (The document has a caption "IEP date 12/15/2006" but that is an error.)
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Joint exhibit A/13	E-mail from T. Harris to [the student's] mother dated 2/23/07
Joint exhibit A/18	Copy of envelope cover dated 4/19 and three pages
Joint exhibit A/19 (Same as Petitioners' 1)	[The district] IEP Document dated 2/23/07, inclusive of [the out of state district] IEP dated 9/29/06 (as marked Pages 1 through 33). This is the IEP at issue in this case.
Petitioners 2	DVD of [the student] at [the out of state district]
Petitioners 3	Envelope dated April 19, 2007, showing date of delivery to Parents of Joint exhibit A-19, the IEP at issue.
Respondents B.	CST Report from [the out of state district] dated 9/24/04
Respondents I.	**** Progress Report information marked "Quarterly Report" and dated 1/17/07
Respondents M.	[The district] "Special Education Meeting Notice" form dated 2/9/07
Respondents N.	[The district] speech therapy service notes dated 2/6/07 – 2/9/07
Respondents O.	[The district] IEP Minutes (handwritten) dated 2/23/07
Respondents Q.	[The district] IEP Minutes dated 2/23/07 (typewritten)
Respondents S.	[The district] speech therapy service notes dated 3/20 – 26
Respondents U.	[The superintendent's] notes re meeting w/[the student's] mother on 4/12/07
Respondents W.	Letter from [the superintendent] to Sheriff's Office dated 4/13/07
Respondents X.	[The district] "Incident Report" document dated 4/22/07
Respondents V.	[The District] "Communication Journal" documents dated as follows: FINDINGS OF FACT

FINDING OF FACTS 1 - 10 were agreed to be true and require no proof:

1. As of the beginning of the 2006-2007 school year, [the student] and her Parents resided [out of state] and [the student] was enrolled as a 3<sup>rd</sup> Grade student in the [out of state district]. At all times since her enrollment in public school, [the student] has been identified as eligible to receive special education and related services under IDEIA. Her most recent Child Study Team (CST) Report was prepared in September of 2004 and identifies her as eligible under an "Other Health Impaired" category based on neuro-developmental delays.

2. As of the beginning of the 2006-2007 school year, [the student] was attending school under the terms of an IEP developed by the [out of state district] and [the student's] Parents dated September 27, 2006. The IEP generally called for a placement in a special education / resource setting for the majority of the school day, and part-time recess and a modified music, PE and library program.

3. In late November of 2006, [the student] and her Parents moved to the \*\*\*\* from [out of

state]. They temporarily resided at the \*\*\*\* in \*\*\*\*, Montana during November and December while construction on their house was being completed.

4. [The student] was initially enrolled as a student in the \*\*\*\* Elementary District No.\*\* in December of 2006, and attended school at \*\*\*\* Elementary. An IEP meeting was conducted on December 15, 2006 to accept [the student's] records and current IEP from [out of state].

5. [The student] and her Parents moved into their new residence on December 24, 2006. When school began again after the winter break, [the student's] mother notified the \*\*\*\* School District of their new address and phone number. Shortly thereafter, \*\*\*\* School District officials advised [the student's] Parents that their residence was not located in the \*\*\*\* Elementary District, but rather in the \*\*\*\* School District.

6. An IEP meeting was conducted on January 17, 2007 to discuss [the student's] progress at \*\*\*\* Elementary and to address her transfer from the \*\*\*\* Elementary District to the [district]. Officials from both \*\*\*\* Elementary District and [the district] attended the IEP meeting, and a structure was put in place to effect [the student's] transition to attendance at [the district].

7. [The student] began attending school at [the district] on approximately January 19, 2007. An IEP meeting at [the district] was initially scheduled for February 16, 2007 and was ultimately conducted on February 23<sup>rd</sup>. The IEP team agreed to adopt the goals and objectives as set forth in the [out of state district] IEP document and as previously adopted at \*\*\*\* Elementary in\*\*\*\*. The IEP team also agreed to continue direct speech / language services, and to continue PT and OT services on a consult basis.

8. During the time period that [the student] attended both \*\*\*\* and [the district], her mother and school officials would communicate, in part, through the use of a "Communication Journal" form. [The student's] mother would send the form to school with her with any specific notes, and the school officials would send the form home with [the student] with indications as to how the day had gone and any specific notes from the teacher.

9. [The student] attended school at [the district] between approximately January 19, 2007 and April 12, 2007, when [the student] ceased attending school.

10. The current Due Process Hearing Request was received by OPI on June 21, 2007.

The following facts are loosely grouped according to factual issues raised. Factual findings may overlap among issues.

#### Description of [the district's] program.

11. [The district] is a kindergarten through eighth grades elementary district located in \*\*\*\* County. There are approximately 400 students. In school year 2006-2007 approximately 22 [district] students received special education or related services pursuant to IEPs. (Testimony of [the superintendent])

12. \*\*\*\* Elementary Public School District \*\* has approximately 2,500 elementary students. (Directory of Schools, OPI, 2006-2007.) [The district] is one of several elementary districts located adjacent or near \*\*\*\* Elementary School District\*\*. These elementary districts are within the \*\*\*\* High School District but are independent of the \*\*\*\* Elementary District.

13. [The student's] home is located within the District's boundary. The Parents were unaware that there were separate elementary districts in the \*\*\*\*\* area when they bought their home. They incorrectly believed [the student] would be attending \*\*\*\*\* Elementary District No. \*\*. (Testimony of [the parents].)

14. When [the student] attended school [at an out of state district] and \*\*\*\*\* Elementary District No. \*\* (\*\*\*\*\* School) the majority of her day was spent in a "life skills classroom." The placement section of the [out of state district] IEP drafted in September 2006 stated that she spent between 39% of time in regular class and noted "[The student] is in an inclusive life skills classroom for the majority of the school day. [The student] received part time recess and modified music, PE, and library program." Joint Exhibit A19, page 25 of 33.

15. Both Montana districts accepted [the student's] evaluation, done in 2004, from the [out of state district]. Both districts also accepted her IEP from the [out of state district] with minor modifications, which is allowed under state and federal law. See 10.16.3342 ARM. The Mother attended the IEP meetings at all three districts.

16. At the hearing, [the district's] Superintendent used the term "self contained classroom." The IEP from [the out of state district] and \*\*\*\*\* used the term "life skills classroom" which appears to mean the same thing. A self contained classroom is a class room with more emphasis on life skills – basic reading, writing, math, safety, self-care, etc. then academics, [the district] uses the term "the learning center (TLC)" for a room that other districts may call "resource room." ([the superintendent] Transcript page 70-71.) Typically, students with IEPs come and go from the resource room for help on a particular subject.

17. At [the out of state district] and \*\*\*\*\* [the student] received special education and related services in a self-contained classroom. (Testimony of [parents].) She spent the majority of her school day in a classroom with other special education students working on life skills – basic reading, writing, math, safety, self-care, etc. She was included with the general education population for appropriate education and social activities.

18. When [the student] attended school in \*\*\*\*\* District No. \*\*, she did not attend her neighborhood school. She was transported by bus to \*\*\*\*\* Elementary, which had a self-contained classroom with 11 students. Typically these students have more severe cognitive and learning disabilities. They interact with the general education program for activities that are important for all children's socialization and life skills – P.E., art, music, recess lunch, etc. (Testimony of Parent.)

19. [The district] does not have a self-contained classroom. [The student] was the only student at [the district] whose majority of the school day was appropriately spent on life skills. The District used its TLC, or resource room, as [the student's] self contained classroom. The District has had students in other years who also used the TLC for the majority of their day.

We've had some kids that have been fully pulled out of their day, maybe minus music or PE or something that we try and mainstream them in. We might have other kids that just from time to time will touch bases in the TLC room.

We look at kids with life skills. [The student's] are obviously a core example of that particular piece. Whether they head to the lunchroom with a peer group. She was working with Mrs. \*\*\*\*\*'s group in the second grade classroom. And then working on life skills that would be much better in the TLC room.

(Testimony of [the superintendent], Transcript page 52

The Parents were not provided a written copy of the agreed IEP.

20. The Parents and the District agree that Exhibit A/19 pages 1-33 is [the student's] IEP. Both parties agree that the Parents were not sent a copy of the IEP until April 19, 2007 (Exhibit 3.) Parents are entitled to a written IEP. 34 CFR 320. Form should not be elevated over substance and a district does not have to adhere to providing a parent with a written copy of the IEP at the exact moment an IEP is agreed upon. What matters most is the content of the agreed education program, not the IEP form. Taking almost two months to provide the parents with a copy of the IEP is too long, however, and a violation of the procedural requirements of the IDEIA.

21. The Mother requested the IEP on several occasions, which should not be necessary. See for example, Exhibit V Communication Journal 3/06/07 "Can I please have [the student's] revised IEP? Has she started O.T. yet?"

22. [The district] did not give the parents a written copy of the IEP (A-19 Pages 1-33) until after the events of April 12, 2007. Inexplicably, page 1 of the IEP is marked that [the student] does not have communication problems or behavior problems. It would be elevating form over substance to find that the IEP team was unaware of those problems at the time of the IEP but the error illustrates why IEP forms should be sent promptly. The error further eroded the Parents' confidence that [the district] could deliver FAPE to [the student].

[The district] did not deliver the physical therapy or occupation therapy related services agreed to in the IEP.

23. [The district] accepted [the student's] IEP from [the out of state district] with minor modifications. It is unknown whether the differences between [the district's] TLC and \*\*\*\* District No. \*\*'s or [the out of state district's] life skills class were discussed at the IEP meeting. The first page of the IEP notes the Mother is concerned about [the student] spending her day in the TLC, "[the mother] maintains that her concern with [the student] being in a self-contained classroom without similarly disabled students is not in her best interest." A/19 Page 1 of 33. [The district] also accepted [the student's] evaluation from [the out of state district].

24. [The district's] IEP form has a section for accommodations and modifications. The forms directions state:

*Specific accommodations, modifications, assistive technology or other forms of support for the student to be involved in and progress in the general education curriculum. Include program modifications or supports for teachers, related service providers, transportation providers and others working with this student. Italics added.*

In this section of the IEP the following notation is typed. "See IEP dated 9/27/06 from [the out of state district] Public Schools for accommodation" Emphasis added. [The district] agreed to provide the same accommodations as [the out of state district's] IEP. That IEP provided for OT and PT services.

25. The 2/23/2007 IEP stated [the student] would spend approximately 2.5 hours a week in a general education setting – second grade – and 29.50 hours a week in the TLC room, which would be [the student's] special education setting. The IEP stated:

Special Education and Related Services	Hours per week in Special Education Setting	Special Education Hours per week in General	Total hours per Week	Date of Service (If different from duration of
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		Education Setting		IEP)
Language Arts	5	2.5	7.5	
Math	7		7	
Speech / Language Therapy	0.75		0.75	
Physical Therapy	(.25)	consult	-.25	
Social / Emotional	8.75		8.75	
Self-Help	8.5		8.5	
Occupational Therapy	(.25)	consult	-.25	
Total Hours	29.50	2.50	32.00	

Joint Exhibit A/19 page 3 of 33.

26. Physical therapy and occupational therapy were on quarter hour weekly consult basis. The negative time shown in the special education setting column is confusing because at first glance it appears as if [the student] would leave the TLC for PT and OT. That was not what was agreed. It was agreed that physical and occupational therapists would consult with the teachers-both special education and regular education– to develop appropriate exercises and drills for[the student], which could be implemented throughout [the student's] school day and at home. For example, if a student needed to develop skills to mount and descend steps appropriate P.E. activities would be suggested.

27. Notes from the 2/23/2007 IEP team also make it clear that both an OT and PT were suppose to be working 15 minutes a week, or one hour a month with teaching staff and developing [the student's] motor skills, which were suppose to worked on as part of her school day. “Team Members discussed how each specialized area, (OT, PT and speech/language therapy) are intertwined in activities throughout [the student's] School day. Team members recognize the need for a multi-disciplinary approach for [the student's] learning. [The student] participates daily in the second grade for the initial start of the day and during PE, music and library, and additional “special” activities such as holiday parties and field trips, and art activities deemed appropriate. Exhibit A page 33 of 33.

28. The parents testified that [the student] did not receive PT or OT services. The Parents and the District had a communication journal with a "went to" column for P.E., music, speech, OT, PT, and Library. Exhibit V. The Parent's brought the journal format with them from [the out of state district] and [the district] agreed to use it. “Went to OT or PT” was never marked. While it is noted that the communication journal was not always accurate -- the "went to" column was rarely marked even though everyone agrees [the student] received speech therapy.-- the Parent's evidence established a factual question – how much PT or OT consultation work was done for [the student] with the teachers and aides at [the district]? .

29. The school district offered no evidence that any PT or OT related service in the form of consultation occurred. Districts are required to provide parents with periodic reports. 34 CFR 320. There were no quarterly progress reports in the record, although that may have been related to the date [the student] stopped attending. The Superintendent testified that he did not know whether [the student] had received the services. Transcript 61 and 62. The \*\*\*\* County Cooperative Director testified that a physical therapist routinely provided evaluation services at [the district] and that she had specific knowledge that a physical therapist had reviewed [the student's] school records, but the Cooperative Director did not know if a program for [the student's] teachers and aides had been developed. Evaluations and related services are not the same thing.



Evaluation for IDEIA purposes has a specific meaning -- procedures used in accordance with 34CFR 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. (34 CFR 300.15) There are some notations in the 2006-2007 school year records regarding physical therapy evaluations but that does not appear to be correct.

30. The [out of state district] IEP stated that

[The student] continues to qualify for direct Occupational Therapy service because she demonstrates below average performance in the areas of fine motor and visual motor abilities. Delays in fine motor and visual skills may limit successful production of written work, copying from the desk/board, or use of classroom materials/tools. Exhibit A Page 10 of 33

Annual Goal: Visual / Fine Motor By 09/28/2007, when given appropriate support [the student] will progress in her pre-writing and cutting skills for classroom tasks improving her visual motor and fine motor skills from copying 4 prerequisite forms (circle, horizontal lines, vertical lines, cross) and not being able to cut along a straight [line] to copying 9 prerequisite forms and being able to cut along a straight and curved line within a set guideline as measured by therapist and classroom teacher data.” How will progress toward this goal be measured? (Check all that apply) :

☒ Copy of Goal Page

☐ Written in Report Card

☒ Written Progress Report

Exhibit A Page 11 of 33

Objective: Visual Motor by 9/28/2007, [the student] will (sic) When given a visual model, [the student] will correctly copy an angled line and X on 3 of 4 attempts as measured by therapist and classroom teacher data.

Objective: Functional Communication - Expressive By 09/28/2007, [the student] will match using real

The [out of state district] IEP also provided for Physical Therapy as needed (PRN). Exhibit A: Page 23 of 33

31. The District’s testimony was clear that it was willing to correct the OT and PT error in the future.

As I look at the IEP that I have now, when I open up the notebook and start studying this summer, I see that those things are listed as consult; that the OT and the PT are consultative pieces. That I don't -- I didn't need to have someone -there's no time set aside for that specifically. Now, whether I need to have the OT and PT person come in and evaluate then give that information so people can work with it, absolutely that can happen. ([The superintendent], Transcript 63 and 64.)

[The student] is being instructed by highly qualified special education teachers not aides

32. A certified teacher with a Montana special education endorsement provided education services in [the district's] TLC. She implemented special education services stated in the IEPs of the 21 students with IEPs who came to the TLC. (Some of those students may have been receiving only a related service such as speech therapy, which the teacher would not have provided.) For example, a

student identified with learning disabilities who had an IEP for special education in math would receive instruction from this teacher. ([The superintendent] Transcript 51-52). The teacher was also responsible for implementing [the student's] IEP. In 2006-2007 she also taught 7<sup>th</sup> and 8<sup>th</sup> grade art. (Testimony of Superintendent \*\*\* Transcript 74-75.)

33. The special education teacher employed by [the district] in 2006-2007 has chosen to work elsewhere. The district is hiring two certified special education teachers for school year 2007-2008. (Superintendent \*\*\*\*\* TR 34-35).

34. Superintendent \*\*\*\*\* testified that in 2006-2007 [the district] employed 6 aides. While he described the arrangement as [the student] had a full-time aide (transcript 70-71) an aide assists, and is supervised by, a teacher not a specific student. Aides are a district staffing decision not an IEP special education or related service.

35. Superintendent \*\*\*\*\* testified that [the student] was with a aide when her teacher was teaching art. He considers that consistent with the staffing practices of [the district], where, because of the small staff, Teacher A often taught a subject to Teacher B's class if Teacher A had a particular expertise, such as art or computer technology. He could not recall another staffing arrangement, however, where an aide regularly taught a class while a certified teacher taught elsewhere. (Testimony of [the superintendent]. Transcript 73-74)

36. Federal regulations state that special education instructors must be "highly qualified" (34 CFR 300.18) which in Montana means that they are certified teachers with a special education endorsement. 10.16. 3136 Administrative Rules of Montana (ARM) [The district's] special education teacher in school year 2006-2007 met the definition of highly qualified. These rules do not prohibit the appropriate use of teacher's aides.

37. Superintendent \*\*\*\*\* testified (Transcript 73) that teachers' aides (he uses the term "para-educators") routinely work one-on-one with students. He did not consider it any different to have a teacher's aide working one-on-one with [the student] in the TLC room while the special education teacher taught 7<sup>th</sup> and 8<sup>th</sup> grade art elsewhere. "[I]n this case I have a para-educator that might be just working one-on-one with number sense, and they're already lined out in what they're doing." Transcript page 74.

38. The Superintendent is correct that it is difficult to draw a clear line between what activity requires a highly qualified instructor and activity requires the supervision of a highly qualified instructor. ARM 10.55.715 (c), which is not a special education rule, provides the following guidance:

Instructional aides assigned to assist students in gaining specialized knowledge not generally available from a properly endorsed teacher shall be supervised by a teacher certified at the proper level. The supervising teacher is responsible for instruction and assessment of students and shall not be simultaneously assigned to another teaching duty or preparation time. Emphasis added

While it is difficult to draw a line, [the district's] use of an aide for [the student] while her teacher was teaching 7<sup>th</sup> and 8<sup>th</sup> grade art is over the line. [The district's] TLC was [the student's] classroom and the special education teacher was her teacher. When her teacher left to teach another subject, [the student] and the aide if one was being used at the time, should have been under the supervision of another certified teacher.

#### Transportation

39. Superintendent \*\*\*\* testified that [the district] does not operate a bus system. It provides transportation contracts to parents living more than three miles from the school. A parent is reimbursed .35/mile for mileage to and from school outside a 3-mile radius of the home to the school. [The district] wrote on the IEP “Because [the district] does not have a bus system, no accommodations needed from transportation.” Exhibit A-19 pg 2 of 33. This statement is incorrect. In its post hearing memo the District softened its position. “The provision of transportation to [the student] via individual transportation contract under § 20-10-121 (2) MCA fulfils any obligation on [the district's] part to provide transportation to [the student] (whether as a related service under IDEIA or otherwise). (Brief page 2)

40. Transportation must be provided by school districts to all students to the extent required by state statute. In addition, transportation is also a special education related service. See, for example, 34 CFR 300.34. Related service are services required to assist with a disability to benefit from special education. Because a school district does not have a bus system, it does not follow that it does not have to provide transportation as a related service if necessary for the child to benefit from special education. If, for example, a parent did not have a driver’s license or a car, it does not follow that the child does not need transportation to school.

41. It is difficult to draw a bright line stating when transportation must be provided as a related service. In this case, the evidence does not show that transportation is required at this time for [the student] to benefit from education. This is based on her disability and circumstances, not on the absence of a bus system. The IEP team will have to consider transportation as a related service on an annual basis.

Restraints, “unavailable for education”, and the April 12, 2007 withdrawal from school.

42. A student may not be subjected to “mechanical restraint that physically restricts a student’s movement through the use upon the student of any mechanical or restrictive device which is not intended for medical reasons.” 10.16.3346 ARM. On April 12, 2007 the special education teacher called the Mother at work and told her to pick up [the student] at the school because she was having a tantrum. The Mother testified that the teacher told her that [the student] was being restrained. The communication journal has the notation “restrained.” Exhibit V 4/12/2007. The District Superintendent testified that [the student] was not being improperly restrained and the restraint referred to was holding [the student] to subdue her tantrums. ([The superintendent], Page 23-26.)

43. The Superintendent’s explanation of the term “restraint” is credible. The evidence does not support any finding that the District was improperly restraining [the student].

44. The District occasionally calls parents to have them pick up their children from school because the child is too upset to continue for the day. While an occasional call to parents to come pick up a young child, will meet the provision of FAPE standard, this cannot be the District’s long term solution. The District called [the student's] parents 4 times between January 17, 2007 and April 14, 2007. The District should have called an IEP meeting to develop a behavior intervention plan. The Parent clearly requested this in the communication journal.

## CONCLUSIONS OF LAW

1. The parents bear the burden of proving that the district failed to implement the IEP. See Van Duyn v. Baker School District No. 51, 481 F.3d 770, 778 (9<sup>th</sup> Cir. 2007).

2. In order to demonstrate that the District failed to implement the IEP, the Parents must demonstrate a material failure on the District's part to implement the IEP, i.e., they must demonstrate that the services provided by [the district] fell significantly short of the services required by the IEP. Any minor discrepancies between the services provided and the services called for by the IEP do not give rise to any IDEIA violation. *Id.* at 780.

3. It is frequently cited law that in Board of Education et al. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the U.S. Supreme Court established a two-part test to determine whether a student has been provided FAPE:

First, has the State [or school district] complied with the procedures set forth in the Act [Individuals with Disabilities Education Improvement Act of 2004]? And second, is the individualized educational program [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. 458 U.S. at 206-07.

4. Applying the first part of this test, while [the district] made procedural violations of the IDEIA, such as its failure to provide the parents with a written copy of the IEP form, those procedural failures did not prevent [the student] from receiving FAPE.

5. Applying the second part of this test, [the student's] 2/23/2007 IEP was reasonably calculated to enable her to receive educational benefit. [The district's] use of its resource room as her life skills or self-contained classroom and the delivery of related services through the \*\*\*\* County Special Education Cooperative do not limit her access to FAPE. [The district] has the capability of implementing her IEP and delivering FAPE to [the student].

6. [The district] is a member of the \*\*\*\* County Special Education Cooperative. Montana statutes, §§ 20-7-452 through 20-7-457, MCA, allow two or more school districts to enter into agreements to cooperatively provide any service a single school district is authorized to provide. Special education and curriculum cooperatives are two examples of education services that several districts may combine to provide. Special education cooperatives are typically used to deliver related services as that term is defined in § 20-7-401, MCA. For purposes a state and federal funding, the

provisions of § 20-9-321 MCA apply to cooperatives.

7. [The district], did not follow the agreed terms of the IEP regarding physical therapy or occupation therapy. While this does not rise to the level of a denial of FAPE, [the district] fell significantly short on these services, which were required by the IEP. A minor discrepancy between the services provided and the services called for by the IEP do not give rise to an IDEIA violation, but the failure to provide OT or PT consultation services agreed on in an IEP is unacceptable.

8. [The student's] IEP states that there will be a 1/4 hour per week consult on these services. The therapists were supposed to meet with [the student's] teachers to show them how to implement PT and OT into her day. The District should have been able to report back to the Parents that the consults were occurring. The special education teacher should have been able to review with the her aides and with the Parents what they should be doing at to work to improved [the student's] fine and gross motor skills. While the District did not have to adhere slavishly to 15 minutes of PT and OT consultation each week, it did have to comply with the spirit and intent of the IEP. To correct this error, the District is directed to provide additional OT and PT services during the 2007-2008 school year.

9. The Montana school district a child attends is a matter of state law outside the jurisdiction of an IDEIA hearing. Out-of-district attendance is decided by local school boards. Given [the student's] specific disabling conditions, her facts and circumstances and the stated desire of her Parents that she attend school in the \*\*\*\*\* District, this hearing examiner suggests [the district] and \*\*\*\*\* District No. \*\* discuss if arrangements could be made for [the student] to attend school in \*\*\*\*\* District No. \*\*.

### ORDER

[The district] must implement [the student's] IEP and provide her with a free, appropriate public education. It is ready and willing to do so.

In school year 2006-2007 [the district] failed to provide the occupational or physical therapy related services called for in [the student's] IEP. The corrective action appropriate to address her needs is to increase the occupational and physical therapy related services provided to [the student] during school year 2007-2008. The appropriate amount of additional occupational and physical therapy

services to be provided will be determined by her IEP team, but will be no less than 2 hours per month in each field. The related service may continue to be provided by consult with the District staff and parents.

The IEP team must develop a behavior plan to address [the student's] tantrums.

DATED this 28<sup>th</sup> day of August, 2007.

Geralyn Driscoll, HEARING OFFICER

CERTIFICATE OF MAILING

The undersigned certifies that she served the attached ORDER by depositing a copy thereof in the United States mail at Butte, Montana, on this 28th day of August, 2007, enclosed in an envelope addressed to each of the below-named persons at the address set opposite his or her name, with postage prepaid, by first class mail.

The parents

Jeff Hindoién Senior Counsel  
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Helena, MT 59601

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Office of Public Instruction Legal Division  
P.O. Box 202501

Helena, MT 59620-2501

DATED this \_\_\_\_ day of \_\_\_\_\_, 2007.

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